SUPREME COURT OF THE STATE OF NEW YORK
ERIE COUNTY

DEANGELO VEHICLE SALES, LLC,

Creditor/Plaintiff,

v.

ADRIAN LEWIS PETERSON,

Debtor/Defendant.

REPLY AFFIRMATION OF JEFFREY F. REINA, ESQ.

Index No.: 813400/2018

JEFFREY F. REINA, ESQ., an attorney duly admitted to practice law in the courts of the State of New York, affirms the following statements to be true under the penalties of perjury pursuant to CPLR § 2106:

1. I am a partner in the law firm Lipsitz Green Scime Cambria LLP, attorney for Plaintiff DEANGELO VEHICLE SALES, LLC ("DVS"). As such, I am familiar with the facts and circumstances set forth in this matter, as well as the pleadings and proceedings had herein.

2. I submit this affirmation in further support of Plaintiff DVS's motion for summary judgment, and in opposition to the cross motion of Defendant ADRIAN LEWIS PETRSON ("Peterson") seeking disclosure pursuant to CPLR 3212(f).

3. At the outset it is important to note that in opposing Plaintiff's motion for summary judgment, and bringing a cross-motion for additional discovery, Defendant Peterson does not contest that he actually received the $5.2 million loaned to him by DVS, nor does he deny that he is in default of his payment obligation under the terms of the subject promissory note – having not repaid any of the money loaned to him.

4. Instead, and as anticipated, Defendant Peterson has invoked CPLR 3212(f) and his purported need for discovery in another vain attempt to further prolong his day of judgment in this matter.

5. In order to prevail on his cross motion, and successfully oppose Plaintiff's summary judgment motion, it is incumbent upon Defendant Peterson to demonstrate "that facts essential to justify opposition may exist but cannot then be stated, and] mere speculation or conjecture [is] insufficient' " *Resetarits Const. Corp. v. Olmsted*, 118 A.D.3d 1454, 1456 (4th Dept. 2014).

6. Unfortunately for Defendant Peterson, his underlying reasons for why discovery is needed do not meet this standard and are unavailing.

7. Defendant Peterson first contends that discovery is needed by pointing to a Form 1099-C that he contends may have been issued to him purportedly "cancelling" $2 million of the $5.2 million loaned to him by Plaintiff DVS.

8. While Defendant Peterson cannot definitively say whether the Form 1099-C was issued by Plaintiff, even if it was, his reliance on the 1099-C is misplaced.

9. Issuance of a Form 1099-C does not foreclose a lender from future collection efforts after its issuance. As noted in numerous cases, issuance of a 1099-C is a reporting requirement of the Internal Revenue Service, and does not evidence that the lender has otherwise released the debtor from liability on the debt. *See F.D.I.C. v. Cashion*, No. 1:11CV72, 2012 WL 1098619, at *7 (W.D.N.C. Apr. 2, 2012), *aff'd*, 720 F.3d 169 (4th Cir. 2013) (Holding "[i]n any event, a Form 1099–C does not itself operate to legally discharge a debtor's liability"); *Bononi v. Bayer Employees Fed. Credit Union (In re Zilka)*, 407 B.R. 684, 689 (Bankr.W.D.Pa.2009) (noting that the issuance of a Form 1099–C does not constitute admission of a discharge of the debtor's liability); *Verdini v. First Nat. Bank of Pennsylvania*, 2016 PA Super 56, 135 A.3d 616, 623 (2016)

(Concluding that "the trial court properly found that issuing the Form 1099–C did not evidence a cancellation of Appellants' debt"); *Leonard v. Old Nat. Bank Corp.*, 837 N.E.2d 543 (Ind. Ct. App. 2005) (Holding that bank's filing of Form 1099–C in response to borrower's bankruptcy proceeding did not operate to cancel debt").

10. Two IRS Opinions support this position as well. *See*, *Info. Letters*, IRS INFO 2005-0208, 2005 WL 3561136 (Dec. 30, 2005) ("Section 1.6050P-1(a)(1) of the regulations provides that solely for purposes of the reporting requirements of section 6050P of the Code, a discharge of indebtedness is deemed to have occurred upon the occurrence of an identifiable event whether or not there is an actual discharge of indebtedness. Section 6050P and the regulations do not prohibit collection activity after a creditor reports by filing a Form 1099-C") (Emphasis added); *Info. Letters*, IRS INFO 2005-0207, 2005 WL 3561135 (Dec. 30, 2005) ("The Internal Revenue Service does not view a Form 1099-C as an admission by the creditor that it has discharged the debt and can no longer pursue collection. Section 1.6050P-1(a) of the regulations provides that, solely for purposes of reporting cancellation of indebtedness, a discharge of indebtedness is deemed to occur when an identifiable event occurs whether or not an actual discharge of indebtedness has occurred on or before the date of the identifiable event') (Emphasis added).

11. Under the U.S. Supreme Court's *Chevron* doctrine, this Court should give deference to the IRS's interpretation. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984) ("We have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations …").

12. Accordingly, the fact that a 1099-C may or may not have been issued to Defendant Peterson does not otherwise give rise to an issue of fact that would preclude granting Plaintiff DVS

summary judgment for the full amount of interest and principal due on the Promissory Note. *See*, *Capital One, N.A. v. Massey*, No. 4:10-CV-01707, 2011 WL 3299934, at *3 (S.D. Tex. Aug. 1, 2011) (Holding on a motion for summary judgment that "a 1099–C does not discharge debtors from liability. Therefore, the fact that Plaintiff issued a 1099–C in relation to the Borrowers' indebtedness is irrelevant and does not raise a genuine issue of material fact in this suit").

13. Moreover, even if the Court were inclined to allow discovery on this issue, Plaintiff DVS should otherwise be entitled partial summary judgment on so much of the principal balance of the loan not otherwise challenged by Defendant Peterson ($3.2 million) together with applicable contract interest thereon through the date of judgment.

14. Defendant Peterson next contends that he should be allowed discovery concerning a loss of value policy and litigation concerning that policy that is ongoing in Pennsylvania. Again, as noted in Plaintiff DVS's initial briefing, the existence of a separate action brought by Plaintiff to recover on a loss of value insurance claim that was assigned to Plaintiff by a former lender to Defendant after his loan to DVS closed is a red herring.

15. The loss of value insurance policy issue is extrinsic to the obligations of Defendant under the Promissory Note and cannot preclude judgment in favor of Plaintiff. *See*, *Alard, L.L.C. v. Weiss*, 1 A.D.3d 131, 131, (1st Dept. 2003) ("invocation of defenses based on facts extrinsic to an instrument for the payment of money only do not preclude …" summary judgment).

16. With respect to the attorneys' fees issue, in order to expedite matters, and to not allow this matter to be further delayed by the machinations of Defendant Peterson, Plaintiff DVS is withdrawing its request for reimbursement of $52,200.23 charged by Heitner Legal, P.L.L.C., and $6,223.00 charged by the Law Office of Stephen Ghee, PLLC.

17. With respect to the 24,527.66 charged by McNees Wallace & Nurrick LLC and the fees and costs sought by Lipsitz Green Scime Cambria LLP, which are continuing to be incurred herein - thus the reason for the $9,000 estimate provided on Plaintiff's instant motion - those can be determined at a fee hearing subsequent to entry of judgment for the principal and interest due on the Promissory Note, which totaled $7,396,711.10 as of July 25, 2019, and has continued to increase in the amount of $2,311.11 each day thereafter. *See Affidavit of Leon C. McKenzie*, sworn to August 1, 2019 [Doc. No. 57], with attached exhibits at ¶ 15.

18. By reason of the foregoing, the instant motion of Plaintiff DVs for summary judgment should be granted, and the cross-motion of Defendant Peterson should be denied.

Dated: August 19, 2019
Buffalo, New York

JEFFREY F. REINA, ESQ.